IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2427 OF 2006

IN

SUIT NO. 3225 OF 1997

ALONG WITH

NOTICE OF MOTION NO. 2428 OF 2006

IN

SUIT NO. 3226 OF 1997

ALONG WITH

NOTICE OF MOTION NO. 2429 OF 2006

IN

SUIT NO. 3227 OF 1997

UNION OF INDIA ... PLAINTIFFS

VERSUS

SURESH J. THANAWALA & Ors. ... DEFENDANTS

Mr. B.A. Desai, Additional Solicitor General, with Mr. S.R.Rajguru for Plaintiffs to support the Notices of Motion.

Mr. Y.S.Jahagirdar, Senior Advocate, i/b. Purnanand 7Co. for Defendants Nos. 1 & 2.

Mr. GT.N.Subramaniam, Senior Advocate i/b. Udwadia Udeshi & Co. for Defendant No.3 to show cause.

CORAM: S.K.SHAH,J.

ORDER RESERVED ON: 27.9.2006.

ORDER PRONOUNCED ON: 28.9.2006.

P.C.

1. These Notices of Motion are taken out by the Plaintiffs in the respective suits praying that Notices of Motion of the Defendants be dismissed and that the Court be pleased to pronounce judgment on all the issues in the aforesaid suits as provided in Order XIV Rule (2)(1) of the Code of Civil Procedure, 1908. The Defendants' Motions are Motion Nos. 2464 of 2002, 2465 of 2002 and 2466 of 2002 in the respective suits under Order VII Rule 11(d) of the C.P.C. for dismissal of the suits being barred by limitation.

2. Brief background of this case is that the Plaintiffs have filed three suits for declaration that the Plaintiffs are the owners of the respective suit lands which are salt lands. Earlier, the Plaintiffs had filed similar Motions under Order VII Rule 11. This Court by order dated 17.1.2000, exercising powers under Order VII Rule 11(d) of C.P.C., rejected the Plaint as being barred by limitation. Against the said order,Appeals were preferred and the Appellate Court by

order dated 10.7.2000, dismissed the Appeals. As such, the Plaintiffs had filed Appeals before the Apex Court and those Appeals were decided on 19.9.2001. The Apex Court thereby allowed the Appeals by the following observations :-

> "We, therefore, set aside the impugned Order and the Order of the learned single Judge dated 17th January, 2000. The Suit stands restored to the file of the High Court. We permit the Plaintiffs to carry out necessary amendments to the plaint if a motion for it is made within a period of 2 weeks from today. After the amendments are carried out the Respondents shall file their written statement within a period of 4 weeks thereafter.
>
> "We clarify that the Respondents/Defendants will be at liberty to take up any or all contentions. They are at liberty to file an Application raising preliminary objections including objection as to the maintainability of the Suit on ground of limitation. If such an application is filed the high Court is requested to dispose of the same on merits within a period of 6 months from the date of its filing."

3. Thereafter, the Plaintiffs amended the Plaint. As per the directions of the Apex Court, the Defendants also filed Written Statement and then took out Notices of Motion again for dismissal of the suits under Order VII Rule 11(d) of C.P.C.on 6.9.2002. When these Motions came up for hearing, it was submitted that it was necessary for them to lead oral evidence on the issue of limitation. This Court by order dated 28.4.2003, allowed the said application granting liberty to the Plaintiffs to lead evidence only on the issue of

limitation. Accordingly, the Plaintiffs led evidence on that point of limitation and closed the evidence. The Defendants did not lead evidence.

4. At the hearing of the aforesaid Notices of Motion taken out under Order VII Rule 11(d) of C.P.C., the hearing was interrupted by the learned Additional Solicitor General making an oral application for framing the issue of limitation on the basis of the averments in the Plaint and the Written Statement. Therefore, this Court by order dated 15.3.2005 raised the following issue :-

> "Whether the claim in the suit is barred by law of limitation provided under Section 20 of the Maharashtra Land Revenue Code, 1966, and under the Limitation Act, 1965, as alleged by the defendants".

5. Thereafter, the arguments on the Notices of Motion taken out by the Defendants were heard. During the course of the arguments, again the learned Additional Solicitor General interrupted the hearing explicitly. He wanted to take out Notices of Motion under Order XIV Rule 2 of C.P.C., submitting that the directions of the Apex Court to dispose of the objection raised with regard to the maintainability of the suit on the ground of limitation, was required to be decided on merits and under Order XIV Rule 2 of C.P.C.,

the same cannot be decided as it is a mixed question of law and fact. As such, the present Motions are taken out.

6. The learned Additional Solicitor General vehemently submitted that in the present case, the Defendants have filed Written Statement. The issue with regard to the limitation has also been framed which, according to him, can be framed only under Order XIV Rule 2 of C.P.C. He further submits that this issue cannot be tried as preliminary issue as it involves mixed question of law and fact. In his submission, under Order XIV Rule 2(2) of C.P.C. it is only the issue of law that can be disposed of as preliminary issue and all other issues have to be decided simultaneously at the time of trial.

7. Referring to the Apex Court’s Order dated 19.9.2001, his submission is that the Apex Court clearly observed "this is not a matter which should have been disposed of in such summary manner." He submits that it means that the Plaint cannot be rejected being barred by limitation at the preliminary stage. He also submits that once the Written Statement is filed and the preliminary issue is raised or framed, the application under Order VII Rule 11 of C.P.C. cannot be filed and, therefore, in his submission, the Motions taken out by

the Defendants under Order VII Rule 11(d) of C.P.C. shall have to be dismissed, and the preliminary issue shall have to be decided along with all other issues as it is not the pure issue of law.

8. The learned Counsel for the Defendants vehemently resisted these Motions on the ground that the Apex Court's Order dated 19.9.2001 was explicit giving an opportunity to the Plaintiffs to amend the Plaint, giving opportunity to the Defendants to file written statement, but simultaneously giving opportunity to the Defendants to file an application raising preliminary objections, including objection as to the maintainability of the suit on the ground of limitation. In his submission, therefore, the Apex Court did not take away the right of the Defendants to file an application under Order VII Rule 11 of C.P.C., raising preliminary objection as to the maintainability of the suit on the ground of limitation. He, therefore, submits that the Motions taken out by the Plaintiffs for dismissal of the defendants' Motions under Order VII Rule 11(d) of C.P.C. shall have to be dismissed. He vehemently submits that at every stage, the hearing of these Motions have been obstructed on behalf of the Plaintiffs by making one or the other frivolous objections and, therefore, he requests for dismissal of the present Motions with heavy costs.

9. The aforesaid observations made by the Apex Court are in the background of the fact that in the Plaint, there was a prayer for condonation of delay of the period of limitation as prescribed under Section 20 of the Maharashtra Land Revenue Code. The Apex Court also took into consideration the submissions made by the learned Solicitor General to the effect that the main relief in the suit was declaration of ownership over the suit land; that the main question would be whether the provisions of the Maharashtra Land Revenue Code under Section 20 therein apply to the suit and that the Defendants had not even filed written statement in the suit. It is in view of these submissions made before the Apex Court by the learned Solicitor General, the Apex Court gave liberty to the Plaintiffs to carry out the amendment of the Plaint and also directed the Defendants to file written statement. While giving these liberties, the Apex Court made it clear that the Defendants would be at liberty to take up any or all contentions and also to make an application raising preliminary objections, including objection as to the maintainability of the suit on the ground of limitation. This was explicit from the order of the Apex Court. This was clearly so observed by this Court in its order dated 28.4.2003. Liberty was given to the Plaintiffs to lead evidence as the Plaintiffs so requested. It is not

observed by the Apex Court that the application should be made raising preliminary objection as to the maintainability of the suit on the ground of limitation only on the basis of the pleadings of both the sides and under Order XIV Rule 2 of C.P.C.

10. Now the question is whether once written statement is filed, whether it is open for the Defendants to file an application as to the maintainability of the suit on the ground of limitation under Order VII Rule 11(d) of C.P.C. Order VII Rule 11(d) provides as under :-

> "11. Rejection of plaint - The plaint shall be rejected in the following cases :-
> (a).....
> (b).....
> (c)....
> (d)where the suit appears from the statement in the plaint to be barred by any law;"

Therefore, on the basis of allegations made in the plaint itself, the plaint can be rejected on the ground of limitation as provided in the Limitation Act or any other law. The question is, whether there is bar of making such application under Order VII Rule 11(d) if further proceedings have taken place in the suit, viz. written statement is filed and preliminary issue is raised?

11. The Apex Court in the case of Popat and Kotecha

Property Vs. State Bank of India Staff Association, reported in (2005) 7 SCC 510, clearly observed as under :-

> "14. In Saleem Bhai v. State of Maharashtra it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage."

12. It is true that as per the provisions of Order XIV Rule 2(2) of C.P.C., it is only the issue of law that can be decided as preliminary issue and not the issue involving mixed question of law and fact. However, the Motion taken out by the Defendants is not under Order XIV Rule 2, but it is only under Order VII Rule 11 of C.P.C. An application under Order VII Rule 11 of C.P.C., as held by the Apex Court, can be made at any stage of the suit and at any time before the conclusion of trial. Therefore, it is clear that filing of written statement or further proceedings having been taken in the suit does not bar an application under Order VII Rule 11 of C.P.C.

13. The learned Additional Solicitor General further

tried to submit that it will have to be decided whether the provisions of Section 20 of the Maharashtra Land Revenue Code applies or otherwise and that, according to him, cannot be done in such summary manner. However, that aspect has no bar as to the maintainability of the application under Order VII Rule 11 of C.P.C. That aspect can be considered while considering the Motions taken out by the Defendants for deciding the maintainability of the suit on the point of limitation.

14. Under these circumstances, the present Motions taken out by the Plaintiffs for dismissing those Motions have got to be dismissed. As discussed above, it appears that the Plaintiffs have been obstructing the hearing of the Defendants' Motions taken out under Order VII Rule 11 of C.P.C. on one ground or the other, even though the Apex Court has specifically observed that if such application is made, the same shall be decided on merits and has also stipulated time-frame. As such, while dismissing these Motions, costs shall have to be awarded to the Defendants.

15. As such, the Motions are dismissed with costs of Rs.10,000/- (Rupees ten thousand only), to be paid in one set (not in all Motions).

(S.K.SHAH,J.)